Supreme Court, U. S.
FILED
JAN 3 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-954

DR. ARTHUR GRESEN,

Petitioner.

— vs. —

DR. HAROLD FEIKES, DR. ROBERT WILLIAMS, DR. T. W. CHRISTIANSEN, TOM ARMOUR, THEODORE JACOBS, JOHN SCHALLEY, MAURICE PEARLMAN, NATHAN ADELSON, ALAN MILLER, DAVID BRANDSNESS, LESLIE SOPER, C. J. ABDO, and SUNRISE HOSPITAL and all members of the surgical committee set forth as JOHN DOES 1 to 10,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK R. DOYLE
R. PAUL SORENSON
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

DR. ARTHUR GRESEN, Petitioner, DR. HAROLD FEIKES, DR. ROBERT WILLIAMS, DR. T. W. CHRISTIANSEN, TOM ARMOUR, THEODORE JACOBS, JOHN SCHALLEY, MAURICE PEARLMAN, NATHAN ADELSON, ALAN MILLER, DAVID BRANDSNESS, LESLIE SOPER, C. J. ABDO, and SUNRISE HOSPITAL and all members of the surgical committee set forth as JOHN DOES I to 10, Respondents.	)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

Petitioner, Dr. Arthur Gresen, through his counsel prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Nevada in the case of DR. ARTHUR GRESEN, Appellant vs. DR. HAROLD FEIKES, et al., entered on September 1, 1977 with rehearing denied October 5, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada is included in the Order Dismissing Appeal, is unreported and is printed in Appendix A hereto, infra, page 8 . No opinion was rendered by the District Court for the Eighth Judicial District of the State of Nevada in and for the County of Clark. The Order for Summary Judgment and Judgment of said Court is printed in Appendix B hereto, infra, page 11 .

JURISDICTION

The judgment of the Supreme Court of the State of Nevada (Appendix A, infra, page 8) was entered on September 1, 1977. A timely petition for rehearing was denied on October 5, 1977. (Appendix C, infra, page 15), and this petition for Certiorari was filed within 90 days of that date. The jurisdiction of the Court is invoked under Title 28 USC, Section 1257(3).

QUESTIONS PRESENTED

1. Can a doctor seek judicial relief in State Court on federal grounds from discharge from the staff of a hospital

acting under color of State law prior to the exhaustion of administrative proceedings on a showing that the proceedings offered will cause irreparable harm and are a sham devoid of minimal due process and directed by competitors?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1.

Title 42, U.S.C., sec. 1983.

STATEMENT OF THE CASE

Petitioner, a Doctor on the staff of Defendant, Sunrise Hospital, was summarily suspended without a hearing on May 5, 1975. After demand, a hearing was scheduled and commenced on May 14, 1975. During the hearing petitioner obtained a Restraining Order from the Nevada District Court on a verified, complaint, infra., Appendix D, p. 17, alleging said hospital was

operating under color of state law and that the hearing was a sham without minimal due process both in procedure and the makeup of the hearing board. The complaint joined the hospital and its directors and several members of the staff committees and sought declarative injunctive relief.

The trial Court on defendant's motion granted judgment dismissing the action on the ground that the hospital is a private hospital with insufficient nexus to constitute color of state law under the United States Constitution. R. p. 143, 144, infra, Appendix E, p. 25. This was the only issue considered.

Petitioner appealed and only this issue of color of state law was presented to the Court. The Nevada Supreme Court, on its own motion, dismissed the appeal on the ground that petitioner had not completed the proceedings offered in the defendant hospital's bylaws, without prejudice to rehear the action upon their completion. The issue was raised completely on the Court's own motion and briefed on motion for rehearing which was denied.

REASONS FOR GRANTING WRIT

This is an important case concerning whether a state Court has power to intervene in a state administratrive proceeding on federal grounds, that is, on due process as guaranteed by the Fourteenth Amendment. We believe that the Nevada Supreme Court in bypassing the question of whether or not there is the requisite color of state law and insisting on a prior completion of futile administrative proceedings has decided the case in a manner inconsistent with the recognized decisions of this Court. Judicial relief should be forthcoming on a showing that the proceedings offered are a sham incapable of giving petitioner a fair and timely hearing and that irreparable harm will result.

Consideration of the question here is important as the correlative to the policies of restraint in federal court intervention into state matters on principles of equity, comity and federalism as enounciated in Younger v. Harris, 401 U.S. 37 (1971) and Samuels v. Machell, 401 U.S. 66 (1971) and as discussed in Gibson v. Berryhill, 411 U.S. 564 (1973). Gibson v. Berryhill, supra, considered but did not decide whether or not in certain cases exhaustion of state administrative remedies may be necessary before federal

intervention under 42 U.S.C. sec. 1983 and indicated that that may well be the case where they are adequate. There is no per se exhaustion requirement. McNeese v. Board of Education, 373 U.S. 668 (1963).

These policies of comity and federalism presuppose the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Gibson v. Berryhill, 411 U.S. 564, 577 (1973). It is a recognition of the state Courts as a co-equal and usually initial guardian of our liberties. It accomplishes little to encourage the State Court alternative if there is no assurance that relief would be available upon a proper showing.

State Courts of general jurisdiction have power to decide cases involving federal constitutional rights where neither Constitution or statute withdraws such jurisdiction. Boston Stock Exch. v. State Tax Com'n., ____ U.S. ____, 97 S.Ct. 599 (1977) Note that the Nevada Supreme Court has not said that the state Courts could not afford relief on federal grounds but rather has limited it by what we submit is an overstated exhaustion requirement. Thus, it is clearly a federal question.

Petitioner recognizes the almost

universal application of the rule that administrative procedures normally must be completed for judicial review. However, petitioner intends to prove that the procedures here are a sham directed by his competitors devoid of minimum due process and that they will cause irreparable harm. According to Gibson v. Berryhill, supra, this showing would justify federal intervention. Similar relief should be available in state court if the court's policy of minimum federal court intervention is to be implemented. The above stated policies regarding federal intervention make this case important and necessary to be considered.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Supreme Court for the State of Nevada.

Respectfully submitted,

/s/ Patrick R. Doyle
PATRICK R. DOYLE
R. PAUL SORENSON
323 Las Vegas Blvd. So.
Las Vegas, Nevada 89101
Counsel for Petitioner

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF NEVADA
Filed September 1, 1977
No. 8853

DR. ARTHUR GRESEN,	)
	)
Appellant,	)
	)
vs.	)
	)
DR. HAROLD FEIKES, DR. ROBERT WILLIAMS, DR. T. W. CHRISTIANSEN, TOM ARMOUR, THEODORE JACOBS, JOHN SCHALLEY, MAURICE PEARLMAN, NATHAN ADELSON, ALAN MILLER, DAVID BRADSNESS, LESLIE SOPER, C. J. ABDO, and SUNRISE HOSPITAL and all members of the surgical committee,	)
	)
Respondents.	)

ORDER DISMISSING APPEAL

Following the suspension of his provisional staff privileges at Sunrise Hospital, appellant was afforded a hearing pursuant to the hospital's by-laws. Instead of participating in the hearing and following the extensive "Hearing and Appellate Review" procedures set forth

in Article VIII of the by-laws, appellant obtained an injunction preventing the hearing and commenced an action to compel respondents to comport with minimum requirements of due process. The district court dismissed the suit on the grounds that the hospital was a private institution and no state action was involved. Here, appellant reasserts his contention that the hospital is "quasi-public" and therefore it must comply with procedural due process.

However, because judicial intervention at this juncture is premature, we do not consider appellant's contention. It is apparent, and counsel so acknowledged, that appellant had and continues to have access to internal remedies provided for in the hospital's by-laws in which he could question the suspension of his staff privileges. If utilized, these remedies might satisfy the requirements mandated by due process which appellant seeks to have judicially imposed upon the hospital. Because these remedies have not been exhausted, there is no present justiciable controversy. See Shulman v. Washington Hospital Center, 348 F.2d 70 (D. C. Cir. 1965). See also Jackson v. Fulton-DeKalb Hospital Authority,423 F.Supp. 1000 (N.D. Ga. 1976); Westlake Comm. Hosp. v. Superior Ct. of L.A. County, 551 P.2d 410 (Cal. 1976). Accordingly we, sua sponte,

ORDER this appeal dismissed, without

prejudice to the rights of the parties following exhaustion of their administrative remedies.

/s/ Batjer, C.J.
Batjer

/s/ Mowbray, J.
Mowbray

/s/ Thompson, J.
Thompson

/s/ Gunderson, J.
Gunderson

/s/ Manoukian, J.
Manoukian

cc: R. Paul Sorenson, Esq.
Patrick Doyle, Esq.
Messrs. Lionel Sawyer & Collins
Albert G. Marquis, Esq.
Loretta Bowman, Clerk

APPENDIX B

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
Filed March 11, 1976
Case A142174

DR. ARTHUR GRESEN,

Plaintiff,

vs.

DR. HAROLD FEIKES, et al.,

Defendants.

ORDER FOR SUMMARY JUDGMENT
AND JUDGMENT

ORDER FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment having come on regularly for hearing on January 8, 1976, which hearing was continued until February 19, 1976, in order to afford the plaintiff the opportunity to take and file the deposition of an employee of Sunrise Hospital; the Court having heard oral argument on February 19, 1976, Paul R. Sorenson, Esq. appearing on behalf of the plaintiff and Albert G. Marquis, Esq. of Lionel Sawyer & Collins appearing on behalf of the defendants; the Court having set this matter for decision

on February 27, 1976, and continued that hearing until March 5, 1976, in order to fully consider an additional affidavit of the plaintiff filed on February 26, 1976; and the Court having considered the pleadings and other documents on file in this action, finds as follows:

1. Sunrise Hospital receives an insignificant amount of funding, if any, from the federal, state and county governments;

2. Sunrise Hospital receives no special state or federal tax exemptions;

3. There is no governmental involvement in the selection, control or suspension of doctors on the medical staff at Sunrise Hospital;

4. No exclusive privileges are granted to Sunrise Hospital by the State Comprehensive Health Planning Commission; the commission merely regulates the number of beds and the type of equipment each hospital in Clark County may have;

5. There is insufficient state or federal involvement in the activities of Sunrise Hospital for the conduct of Sunrise Hospital or its medical staff to be viewed as state action; and

6. That in viewing all matters in a light most favorable to plaintiff, there exists no genuine issue of material fact, and defendants are entitled to judgment as a matter of law.

Based on the foregoing determinations, and other good cause appearing therefor, it is hereby

ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted as to all issues, and it is,

FURTHER ORDERED that the complaint be, and it hereby is, dismissed without leave to amend, and that judgment be entered dismissing the action with prejudice, and it is

FURTHER ORDERED that this Order and Summary Judgment shall not operate to the prejudice of the plaintiff's right, if any, to file a subsequent action based on breach of contract.

JUDGMENT

Based upon the foregoing order for summary judgment, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff's action against the defendants be, and the same hereby is, dismissed with prejudice;

2. That defendants recover of plaintiff their costs.

DATED this 9 day of March, 1976.

/s/ John F. Mendoza
JUDGE JOHN F. MENDOZA

Submitted by:

LIONEL SAWYER & COLLINS

By _____
ALBERT G. MARQUIS
302 E. Carson Ave., Suite 800
Las Vegas, Nevada 89101
Attorneys for Defendants

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEVADA
Filed October 5, 1977
No. 8853

DR. ARTHUR GRESEN,

Appellant,

vs.

DR. HAROLD FEIKES, DR. ROBERT WILLIAMS, DR. T. W. CHRISTIANSEN, TOM ARMOUR, THEODORE JACOBS, JOHN SCHALLEY, MAURICE PEARLMAN, NATHAN ADELSON, ALAN MILLER, DAVID BRADSNESS, LESLIE SOPER, C. J. ABDO, and SUNRISE HOSPITAL and all members of the surgical committee,

Respondents.

ORDER DENYING REHEARING

Rehearing denied.

It is so ORDERED.

/s/ Batjer, C.J.
Batjer

/s/ Mowbray, J.
Mowbray

/s/ Gunderson, J.
Gunderson

/s/ Manoukian, J.
Manoukian

cc: R. Paul Sorenson, Esq.
Patrick Doyle, Esq.
Messrs. Lionel Sawyer Collins
Albert G. Marquis, Esq.

APPENDIX D

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
Filed June 10, 1975
Case A142174

DR. ARTHUR GRESEN,

Plaintiff,

vs.

DR. HAROLD FEIKES, DR. ROBERT WILLIAMS, DR. T. W. CHRISTENSEN, TOM ARMOUR, THEODORE JACOBS, JOHN SCHALLEY, MAURICE PEARLMAN, NATHAN ADELSON, ALAN MILLER, DAVID BRANDSNESS, LESLIE SOPER, C. J. ABDO, and SUNRISE HOSPITAL and all members of the surgical committee set forth as JOHN DOES 1 to 10,

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

COUNT ONE

Plaintiff above-styled complains of

Defendants, above-styled and for a cause of action alleges as follows:

1. Plaintiff is a board certified cardiovascular and thoracic surgeon duly admitted to the State of Nevada as a medical doctor, having been trained at the Mayo Brothers Clinic in Rochester, Minnesota and at the L.D.S. Hospital and the University of Utah in Salt Lake City, Utah.

2. Plaintiff has a contract with Defendant, SUNRISE HOSPITAL, to perform his services as a surgeon and physician through use of their facilities.

3. Defendant, SUNRISE HOSPITAL, is a state regulated, federally funded, private hospital with sufficient federal and state support and regulations to invoke the color of state law nexus to require Defendant, SUNRISE HOSPITAL, to provide Plaintiff at least minimal procedural and substantive due process.

4. Defendants, DR. HAROLD FEIKES, DR. ROBERT WILLIAMS, DR. DANIEL WILKES, DR. T. W. CHRISTENSEN, TOM ARMOUR, THEODORE JACOBS, JOHN SCHALLEY, MAURICE PEARLMAN, NATHAN ADELSON, ALAN MILLER, DAVID BRANDSNESS, LESLIE SOPER, C. J. ABDO, and SUNRISE HOSPITAL and all members of the surgical committee and executive committee, set forth as JOHN DOES 1 to 10, are licensed medical doctors, board members of the staff of SUNRISE HOSPITAL,

or members of the Ad. Hoc. surgery committee and JOHN DOES 1 to 10, whose true names are unknown to Plaintiff at this time.

5. That on April 2, 1975, a heart patient of Plaintiff was scheduled for surgery, anesthetized, prepped, and draped for surgery. Sudden unexpected water failure in the operating room, caused by excavating equipment, necessitated cancelling of surgery for that day. The patient, who was in great pain, demanded surgery the following day; and on the following day of April 3, 1975, actual surgery was performed by Plaintiff, however, the patient died on the operating room table.

6. Without prior notice or consultation, on April 4, 1975, Plaintiff, DR. ARTHUR GRESEN, and CLIFF DAVENPORT, were called at 1:30 o'clock P.M. by DR. WILKES to view pathology of the heart of patient, No. 2133643. Plaintiff arrived in Sunrise Hospital pathology lab, and at 1:50 o'clock P.M., whereupon Plaintiff met with the Defendant, DR. WILKES. When Plaintiff first arrived at the laboratory, there was another body on the autopsy table and another autopsy was in progress. Defendant, DR. WILKES, only showed Plaintiff a completely incredibly chopped up and totally destroyed heart grafts, already ripped and dissected apart. Although Plaintiff vigorously objected to such non-standard action, Defendant, DR. WILKES,

gave Plaintiff indefinite findings and stated that he could actually not see anything definite, except for a question of the mammary artery graft. Defendant, DR. WILKES, showed Plaintiff a gross surgical probe (in excess of one millimeter). Defendant, DR. WILKES, represented to the Plaintiff that he would get back to DR. GRESEN about the micro-dissection; said events in the laboratory all took place in about three (3) to five (5) minutes.

7. On or about the 5th day of May, 1975, by letter from Defendant, DR. ROBERT WILLIAMS, (See copy attached hereto and marked Exhibit "A") Plaintiff was informed without prior hearing and without prior notice that he had been summarily suspended from the practice at SUNRISE HOSPITAL by DR. WILLIAMS and his surgical committee, whose names and addresses are presently unknown to the Plaintiff, but are set forth herein as JOHN DOES I to 10.

8. Thereafter, Plaintiff demanded a fair and impartial hearing before the Executive Committee of the medical staff, whereupon an Ad. Hoc. Committee was formed by Defendants without the benefit of due process random selection of its members, and in violation of Defendant, SUNRISE HOSPITAL'S own rules and regulations, to-wit: Rule 4(a).

9. At the start of the hearing before the Ad. Hoc. Committee on the 14th day of May, 1975, the Plaintiff was not informed of the names of the persons presiding as committee members, and was denied any voice in their selection.

10. Plaintiff was and continues to be denied the right to appear with legal counsel, and Plaintiff was denied by Defendants, and continues to be, denied the right to tape record the hearing.

11. Plaintiff has been denied the right to have, purchase or see a copy of the transcript of the beginning of the hearing.

12. Plaintiff has been denied the right to compel attendance of witness and/or to take Deposition of witness and otherwise conduct discovery, including copy of Minutes of Suspension hearing.

13. Plaintiff's state constitutional rights to due process are being totally denied by a star chamber's proceedings not likened under common law since Henry the Eighth.

15. Defendants' actions are and continue to be arbitrary, capricious, unreasonable and unconstitutional.

16. Defendants are enforcing Rules Article VIII, Sec. 1(a) of SUNRISE HOSPITAL, which are arbitrary, capricious,

unreasonable and unconstitutional, in that said rules provide that Plaintiff cannot have counsel present.

17. Plaintiff, on information and belief, alleges that Defendants are destroyint or will destroy vital evidence and records relative to CASE NO. 2133643, if not enjoined by this Court.

18. The above described actions, conduct and rules of Defendant, SUNRISE HOSPITAL, are causing Plaintiff irreparable harm and injury, and are denying Plaintiff his constitutional rights without any plain, speedy or adequate remedy at law.

19. Plaintiff seeks a temporary, preliminary and permanent injunction against the Defendants from holding any hearings without counsel, without Court Reporters, without public hearing, without fair and impartial hearing board members randomly selected to conform to due process.

20. Plaintiff seeks a temporary Restraining Order and preliminary and permanent injuncition against the Defendants from doing or attempting to directly or indirectly, the destruction, tampering with or the mutilation of any part of the post mortum remains of the deceased patient, NO. 2133643, or the destruction, mutilation, or alteration or concealment or removal from the jurisdiction of this Court, of any records, reports, correspondence, communication between any doctor, surgeon or agent of Defendants concerning the treatment,

diagnosis, surgery, or post mortum diagnosis upon the body of Patient, NO. 2133643.

WHEREFORE, Plaintiff prays that this Honorable Court will issue a Temporary Restraining Order, Preliminary and Permanent Injunction against the Defendants, their officers, directors, agents, servants, employees and those persons acting in concert or participation with them or under their direction and control, restraining and enjoining said Defendants from the following:

1. From doing or attempting to directly or indirectly through any means or instrumentaility in an matter whatsoever, in the County of Clark or State of Nevada, the destruction, tampering with, or mutilation of any part of post mortum remains of the deceased patient, NO. 2133643, or the destruction, mutilation, or alteration or concealment or removal from the jurisdiction of this Court of any records, reports, correspondence, communication between any doctor, nurse, or employee of SUNRISE HOSPITAL, to any other doctor surgeon, or agent of Defendants concerning the treatment, diagnosis, surgery of post mortum diagnosis upon the body of patient NO. 2133643.

2. From holding any further hearings concerning the Plaintiff or any further hearing concerning patient, NO. 2133643

3. For such other further and different relief as the Court deems just and proper in the premises.

KERMITT L. WATERS and
R. PAUL SORENSON

By: /s/ R. Paul Sorenson
Attorneys for Plaintiff
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DR. ARTHUR GRESEN, being first duly sworn, deposes and says:

That he is the Plaintiff in the above-entitled action; that he has read the above and foregoing COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF, and knows the contents thereof; that the same is true and correct to the best of his knowledge.

/s/ Arthur Gresen
Dr. ARTHUR GRESEN

SUBSCRIBED and SWORN to before me this 10th day of June, 1975.

/s/ Francette Liance
NOTARY PUBLIC in and for said County and State.

APPENDIX E

EXCERPT FROM THE RECORD

I think the record is rather clear there is no state action nor statement involvement in the operation of this hospital. I have read and reviewed all the cases cited by Counsel, and the case most recently denied by the Supreme Court as to a possible issue where a hospital received federal funding, etc. The matter seems to be whether or not there is this control or to classify this as a public hospital. In my reading of the many facts of this case I cannot find that to exist.

The issue that has been raised inferentially is the issue of whether or not the hospital, in itself, has possibly violated its own rules and regulations. It would appear to the Court, however, that the principle issue raised in this motion is the issue they have failed to comply with the due process requirement of the U. S. Constitution.

In this regard I find they are not required to conform to those standards since they are a private hospital, and there isn't sufficient connection between state and federal control over their private activities. For that reason the motion for summary judgment is granted.

However, I do wish to add this comment that the dismissal of this action is without prejudice to bring whatever other type of proceeding wherein Counsel and his Client believe that this contractual right may have been violated because that issue was not before the Court, and since it is not before the Court I cannot preclude Counsel from proceeding in that vein.

The motion for summary judgment is granted, but limited to the issue of state action.

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Petition for a Writ of Certiorari was served of the following by mailing two copies thereof, first class mail, postage prepaid to:

Albert G. Marquis
LIONEL, SAWYER & COLLINS
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

on the 31st day of December, 1977.

/s/ Sarah S. Higgins
Sarah S. Higgins